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No. 02-5664

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES THOMAS SELL,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

John W. Whitehead
Steven H. Aden
(Counsel of Record)
M. Casey Mattox
THE RUTHERFORD INSTITUTE
112 Whitewood Rd.
Charlottesville, VA 22901
(434) 978-3888

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STATEMENT OF INTEREST OF AMICUS CURIAE AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed briefs in the United States Supreme Court on behalf of the rights of the accused in numerous significant criminal justice cases, including *Illinois v. Wardlow*, 528 U.S. 119 (2000), *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Indianapolis v. Edmond*, 531 U.S. 32 (2000). The Institute has published educational materials and taught continuing legal education classes in this area as well.

The Rutherford Institute is participating in *Sell v. United States* as an *amicus* of the Court because it regards this appeal as a potentially groundbreaking case in the areas of bodily integrity and freedom of thought. Certainly, where mentally disabled persons in the government's care pose an immediate threat to themselves or others, the government has a compelling interest in providing reasonable treatment to prevent such harm. Furthermore, the government has an important interest in bringing those charged with criminal activity to trial. However, the government must not be

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[1] *Amicus curiae* The Rutherford Institute files this brief by consent of counsel for both parties. Copies of the letters of consent are on file with the Clerk of the Court. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than The Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

permitted to resort to the forcible injection of nondangerous individuals with dangerous mind-altering medications in an effort to bring individuals to trial for nonviolent crimes.

SUMMARY OF THE ARGUMENT

The forcible injection of antipsychotic medication into one's body is a substantial invasion of an individual's rights to maintain one's bodily integrity and to control one's thoughts. Given these invasions of an individual's rights as well as the danger associated with these medications, the government should not be permitted to forcibly medicate individuals unless its action is the least restrictive means available to meet a compelling government interest. The government's interest in increasing the likelihood that an individual may be brought to a fair and impartial trial is not sufficiently compelling to enable the government to forcibly inject dangerous and mind-altering antipsychotic drugs into a non-dangerous pretrial detainee still cloaked with the presumption of innocence. This is particularly true where, as in this case, the alleged crime for which the government seeks to bring the pretrial detainee to trial is a nonviolent offense.

ARGUMENT

I. STRICT SCRUTINY SHOULD APPLY TO THE FORCIBLE ADMINISTRATION OF ANTIPSYCHOTIC DRUGS TO PRETRIAL DETAINEES.

Government actions which implicate fundamental rights must satisfy strict scrutiny review, whereby such actions must be justified by a compelling state interest and the absence of lesser intrusive alternatives to achieve the interest. *Griswold v. Connecticut*, 381

U.S. 479, 497 (1965). The pretrial detainee, no less than any other person, possesses fundamental constitutional rights which should not be infringed unless the action is narrowly tailored to satisfy a compelling government interest. The state's mere allegations that a citizen has committed non-violent crimes should not suffice to override these fundamental rights.

A. FORCIBLE ADMINISTRATION OF ANTIPSYCHOTIC MEDICATION TO A PRETRIAL DETAINEE IMPLICATES THE DETAINEE'S FUNDAMENTAL FIFTH AMENDMENT RIGHT TO REFUSE MEDICAL TREATMENT.

1. The Due Process Clause of the Fifth Amendment Encompasses the Right to Refuse Antipsychotic Medication.

The right to preserve one's bodily integrity by refusing unwanted medical treatment is a paramount right in the hierarchy of constitutional values. As the Court has stated:

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 269 (1990), *quoting Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). *See also Schmerber v. California*, 384 U.S. 757, 771 (1966) ("The integrity of an individual's person is a cherished value of our society.") The common law recognized the importance of the right of bodily integrity by making nonconsensual

medical procedures actionable in tort as battery. *See Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-30 (N.Y. 1914) (Cardozo), *overruled on other grounds by Bing v. Thunig*, 2 N.Y.2d 656 (1957). Numerous federal circuit and district courts have also recognized that the due process clauses of the Fifth and Fourteenth amendments protect the right to avoid unwanted psychiatric treatment. *See, e.g., United States v. Brandon*, 158 F.3d 947, 953 (6th Cir. 1998); *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985).

Moreover, in two cases arising from the correctional context, this Court has recognized that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 229 (1990), quoted in *Riggins v. Nevada*, 504 U.S. 127, 133-34 (1992). In those cases, involving involuntary medication by *state* officials, the Court found the liberty interest in avoiding injections of anti-psychotic drugs in the Due Process Clause of the Fourteenth Amendment. Where, as in this case, the *federal* government seeks to forcibly inject a pre-trial detainee with anti-psychotic medication, the detainee's liberty interest in his bodily integrity is rooted in the Due Process Clause of the Fifth Amendment. *Brandon*, 158 F.3d at 953.

2. The Forced Injection of Antipsychotic Drugs is a Substantial Invasion of One's Bodily Integrity.

The invasion of one's bodily integrity imposed by forced antipsychotic medication is substantial. This Court has previously observed that "the drugs can have serious, even fatal, side effects." *Harper*, 494 U.S. at 229. Indeed, the government's medical expert

in the instant case testified that .01% of persons treated with antipsychotic drugs will develop neuroleptic malignant syndrome, a "rare but fatal" reaction. *Sell*, 282 F.3d 560, 569 and n. 13 (testimony that one in ten thousand chance existed). Other studies have indicated that antipsychotic drugs may also cause a variety of blood disorders called dyscrasias. One of these blood disorders, agranulocytosis, causes a decrease in white blood cells, rendering the patient susceptible to life-threatening infections. Dennis E. Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 LA. L. REV. 283, 298-99 (1992). Thus, by forcibly injecting antipsychotic drugs into non-dangerous pretrial detainees, the government exposes those persons to potentially fatal consequences.

Antipsychotic drugs may also result in many other debilitating, albeit nonfatal, side effects. This Court has previously recognized that antipsychotic drugs can cause tardive dyskinesia, "a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face." *Harper*, 494 U.S. at 229-30, citing *Mills v. Rogers*, 457 U.S. 291, 293, n.1 (1982). In *Harper*, this Court recognized that between 10 and 25% of those treated with antipsychotic drugs will develop tardive dyskinesia. 494 U.S. at 229-30. Other side effects of antipsychotic drugs which this Court has recognized include acute dystonia, "a severe involuntary spasm of the upper body, tongue, throat, or eyes," and akathisia, "motor restlesness, often characterized by an inability to sit still." *Harper*, 494 U.S. at 229-30. *See also Mills*, 457 U.S. at 293, n.1. Some evidence also suggests that "akathisia, in the extreme case, can drive people to suicide or to homicide." Cichon, 53 LA. L. REV. at 302, *quoting* Theodore Van Putten & Stephen R. Marder, *Behavioral Toxicity of Antipsychotic Drugs*, 48 J. CLINICAL

PSYCHIATRY 13, 14 (1987). Some studies have indicated that over 60% of those who receive antipsychotic drugs will suffer from some symptoms of akathisia, with over 20% suffering from severe akathisia. Cichon, 53 LA. L. REV. at 302.

Medical studies have revealed a long list of other side effects which may result from antipsychotic medications. These include dry mouth, constipation, intestinal paralysis (paralytic ileus), blurred vision or blindness, impotence, reversed ejaculation into the bladder, priapism (sustained and painful erections that may require surgery), infertility, spontaneous lactation, skin disorders ranging from rashes to irreversible discolorations, jaundice, liver dysfunction, and cardiovascular irregularities. Cichon, 53 LA. L. REV. at 297-99. Antipsychotic drugs may also cause varying degrees of parkinsonism, a disorder with effects similar to Parkinson's disease. The symptoms of parkinsonism include "'a mask-like face,' drooling, muscle stiffness and rigidity, shuffling gait [and] tremors .... In less severe cases, the patient may seem apathetic and bored with a 'zombie-like' appearance." Brian Shagan, *Washington v. Harper: Forced Medication and Substantive Due Process*, 25 CONN. L. REV. 265, 268 (1992). See also *Mills*, 457 U.S. at 293, n.1.

The dangers inherent in the administration of antipsychotic drugs highlights the importance of the individual's interest in avoiding forced treatment. These medications can produce debilitating, life-altering and even fatal side-effects. Thus, they bear no resemblance to much less intrusive medical interventions which the Court has determined implicate only a minimal liberty interest. *See Schmerber*, 384 U.S. at 771 (pin prick of finger for a blood test). Indeed, the risks and extent of harm inherent in the administration of antipsychotic drugs to pretrial detainees are at least as serious as

those which the Court has previously held to outweigh the government's interests. *See Winston v. Lee*, 470 U.S. 753, 755-56 (1985) (surgical removal of a bullet); *Rochin v. California*, 342 U.S. 165, 172 (1952) (forced insertion of a stomach pump). The use of chemical agents to alter one's mind and to potentially affect one's muscular and other bodily functions is at least as invasive as the mechanical invasion of surgery. The pre-trial detainee's interest in avoiding the administration of these dangerous and potentially life-threatening drugs should not be infringed unless the government's action is the least restrictive means by which it may accomplish a compelling interest.

B. FORCIBLE ADMINISTRATION OF ANTIPSYCHOTIC MEDICATION TO A PRETRIAL DETAINEE IMPLICATES THE DETAINEE'S FUNDAMENTAL RIGHT TO FREEDOM OF THOUGHT.

As this Court noted in *Riggins*, 504 U.S. at 134, the invasion of one's bodily integrity posed by the forcible injection of antipsychotic medication is particularly severe because the medication affects not only the body, but the mind as well. *See also Harper*, 494 U.S. at 229. The government should not be permitted to forcibly alter a pretrial detainee's mental functions by the use of antipsychotic medication unless its action is the least restrictive means by which it may accomplish a compelling interest.

1. The First Amendment Protects Freedom of Thought.

The First Amendment protects persons from government interference with their thoughts at least as stringently as it protects spoken or written words. This Court has held that although the First

Amendment directly refers only to "freedom of speech," it also protects the "freedom of thought" which is a necessary predicate to the freedom of speech. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("The First Amendment['s] protection does not end at the spoken or written word."); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) ("At the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State"); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a New Hampshire statute mandating the display of license plates bearing the state motto "Live Free or Die" violated "the right of freedom of thought protected by the First Amendment"). In *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937), this Court recognized that "freedom of thought ... is the matrix, the indispensable condition, of nearly every other form of freedom."

As this Court has observed, "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969). In his preamble to Virginia's Statute for Religious Freedom," Thomas Jefferson wrote:

> ... Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burdens, or by civil incapacitations ... are a departure from the plan of the holy author of our religion...

Thomas Jefferson, *Virginia Statute for Religious Freedom* (1785). Indeed, the First Amendment's protection of the freedom

of speech would be worthless if the government were permitted to control the thoughts that give rise to that speech.

2. Antipsychotic Drugs Interfere With an Individual's Mental Processes.

In *Riggins*, 504 U.S. at 134, quoting *Harper*, 494 U.S. at 229, this Court held that the interference with a person's liberty interest under the Due Process Clause was "particularly severe" because the injections do not merely interfere with the detainee's bodily integrity, but their express purpose is "'to alter the chemical balance in a patient's brain, leading to changes, intended to be beneficial, in his or her cognitive processes.'" In *Mills*, this Court also recognized that the very purpose of antipsychotic drugs was to alter one's mind. 457 U.S. at 293, n.1. However supposedly beneficial the effects of antipsychotic medications, it is undeniable that their intended effect is to alter Dr. Sell's mental processes.

Aside from the arguably beneficial effects on an individual's otherwise "abnormal" mental processes, antipsychotic drugs also affect other "normal" mental processes. The common side effects of the drugs include sedation, a sense of apathy and impairment of one's concentration and ability to speak. Cichon, 53 LA. L. REV. at 301; Winick, Bruce J., *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIAMI L. REV. 1, 70-71 (1989). The Tenth Circuit has observed that "antipsychotic drugs have the capacity to severely and even permanently effect an individual's ability to think and communicate." *Bee v. Greaves*, 744 F.2d at 1394. The Ninth Circuit has also recognized that antipsychotic medication may cause "impermissible tinkering with the mental processes." *Mackey v. Procunier*, 477 F.2d 877, 878 (9th Cir. 1973). Both the ostensibly beneficial and

the detrimental effects of antipsychotic drugs thereby alter the patient's thought processes and ability to think and reason.

3. That the Use of Antipsychotic Medication is Intended to Restore "Normalcy" to the Patient Should not Diminish Scrutiny of the Government's Actions.

The fact that antipsychotic drugs are intended to benefit a patient by restoring "normal" thought processes should not reduce the level of scrutiny where the government seeks to forcibly administer these agents. As Justice Brandeis warned in *Olmstead v. U.S.*, 277 U.S. 438, 479 (1928) (Brandeis, J., Concurring):

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

More recently, several members of this Court have affirmed that judicial scrutiny of government's intrusion on individuals' rights is not lessened merely because the government asserts benevolent motives. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995), this Court held that strict scrutiny applies to racial classifications by the government even where the racial classification is "benign." Justice Thomas dismissed the notion that any lesser standard of review should be applied to actions which the government claimed were well-meaning:

> That these programs have been motivated, in part, by good intentions cannot provide refuge from the principle that

> under our Constitution, the government may not make distinctions on the basis of race.

Adarand Constructors, 515 U.S. at 240 (Thomas, J., concurring). Several years earlier, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, criticized the Court's lesser standard of review for "benign racial classifications," stating, "the Court's emphasis on 'benign racial classifications' suggests confidence in its ability to distinguish good from harmful uses of racial criteria. History should teach greater humility." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 609 (1990) (O'Connor, J., dissenting). *See also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (That a statute discriminated against males rather than females "does not exempt it from scrutiny or reduce the standard of review.")

Moreover, lowering the bar for the government to forcibly administer mind-altering drugs to an individual where it does so to "restore normalcy" would require courts to make the historically elusive and dubious distinction between normal and abnormal thoughts. What constitutes normal mental processes is necessarily subjective and changes over time. No objective definition of normalcy can be identified by which courts can differentiate between well-intended and ill-intended forced injections of individuals with antipsychotic medications. For example, as recently as the late 1980's Soviet psychiatrists used antipsychotic medication to "treat" individuals for "delusions of reformism" and "anti-Soviet thoughts." Richard J. Bonnie & Svetlana V. Polubinskaya, *Unraveling Soviet Psychiatry*, 10 J. CONTEMP. LEGAL ISSUES 279, 282-83 (1999). *Cf. Buck v. Bell*, 274 U.S. 200, 207 (1927) with *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (criticizing rationale of *Buck*). In view of the jurisprudential

lessons of history in this area, the Court should avoid making itself the final arbiter for what are normal or abnormal thoughts. Such would come perilously close to the government prescribed orthodoxy of thought that this Court refuted in *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943).

II. Pretrial Detainees' Fundamental Rights Are Not Outweighed by the Government's Interest in Increasing the Possibility that He Will Become Competent to Stand Trial for Nonviolent Crimes.

That the government has an interest, even an important one, in bringing an individual suspected of criminal activity to trial is undeniable. *See, Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring) ("Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and a prerequisite to social justice and peace.") The question in this case, however, is whether the government's interest is so compelling that it overrides the fundamental rights of a non-dangerous pretrial detainee, requiring him to have his bodily integrity violated, risking serious side effects and even death, and allowing his mind to be chemically altered so that the government can attempt to render him sufficiently competent to stand trial on nonviolent crimes. To make this determination, the Court must first define the precise governmental interest at stake.

A. The Government's Interest is in Increasing the Likelihood that a Defendant May be Brought to a *Fair* Trial.

1. The State's Interest, like that of the Criminal Defendant, is in a Fair Trial.

The interest of the state is not in merely subjecting a person to the machination of the court system and achieving a verdict. The state itself, no less than the criminal Defendant, has an interest in a fair and impartial trial. In *J.E.B. v. Alabama*, 511 U.S. 127, 137 (1995) (The "state's interest in *every* trial is to see that the proceedings are carried out in a fair, impartial, and nondiscriminatory manner." (emphasis in *J.E.B.*) The Sixth Amendment right to a fair trial must not be viewed as a protection for the Defendant and a countervailing obstacle for the state. If it were, then the government could argue that its compelling interest in bringing criminal Defendants to trial justified its trying even some incompetents. *Compare Pate v. Robinson*, 383 U.S. 375 (1966) (holding that the Constitution prohibits the government from bringing an incompetent Defendant to trial). But the Sixth Amendment is not merely a protection for the individual, it expresses the interest of the state as well in maintaining a fair and impartial criminal justice system. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Sixth Amendment helps to ensure that only the proper person is convicted. The interests of neither the state nor the public are advanced if the wrong person is convicted of committing a crime. Similarly, the Sixth Amendment right to a fair trial helps to ensure public confidence in the criminal justice system. A system in which the state's interest is in merely achieving guilty verdicts while the criminal Defendant's interest alone is in fairness and impartiality would quickly lose public confidence. Thus, the state, no less than the criminal Defendant, has an interest in a fair and impartial trial.

There is a substantial possibility that even if Dr. Sell is restored

to a level of competency technically sufficient to allow the government to constitutionally bring him to trial, the resulting trial would nonetheless be less than the fair and impartial trial that is in the government's interest. *See, J.E.B.*, 511 U.S. 127; *Riggins*, 504 U.S. at 142-43 (Kennedy, J., concurring). As Justice Kennedy observed in *Riggins*, 504 U.S. at 142-43:

> It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial ... At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact .... The side effects of antipsychotic drugs may alter demeanor in a way that will prejudice all facets of the defense. Serious due process concerns are implicated when the State manipulates the evidence this way.

Moreover, "[t]he side effects of antipsychotic drugs can hamper the attorney-client relation, preventing effective communication and rendering the defendant less able or willing to take part in his defense. The State interferes with this relation when it administers a drug to dull cognition." *Riggins*, 504 U.S. at 143-44 (Kennedy, J., concurring) at 144. If the antipsychotic medications forcibly administered to a Defendant cause him to be unable to express remorse for his actions or to control his facial expressions at trial, or to fully communicate with his attorneys, the fairness of the trial may rightly be doubted. *Id.* at 144.

Because these potential effects on the pretrial detainee call into question the fairness of the trial, the government's interest in a fair and impartial trial is compromised. More importantly, because the government's interest is in administering a fair and impartial trial, the

government should be required to bear the burden of demonstrating that its forcible administration of antipsychotic drugs on a pretrial detainee for the purpose of restoring his competency will not cause the types of side effects discussed above that could result in an unfair and prejudiced trial. If the government cannot make such a showing, then it has failed to assert a compelling government interest that may override the pretrial detainee's fundamental rights.

2. The Government's Interest Should be Discounted by the Possibility that the Treatments Will Not Restore Sell's Competency.

The substantial possibility that the forcible administration of antipsychotic drugs will not restore Sell's competency diminishes the value of the state's interest. This Court has recognized that the likelihood that the government will be able to accomplish its objective is relevant to the balancing of the interests of the government and the individual where the government seeks to violate an individual's bodily integrity. *See Schmerber*, 384 U.S. at 771 (citing the effectiveness of blood sample testing for determining whether an individual is intoxicated). This requirement ensures that however compelling the government's interest might be in theory, it should not be permitted to burden an individual's rights, or in this case, to subject them to the risk of serious and even deadly side effects, if it has little realistic hope of satisfying that interest. By the same token, where the likelihood of the government meeting its interest is less than certain, that uncertainty must be considered when determining whether the individual must be placed at risk in order for the government to attempt to achieve its interest.

The Eighth Circuit recognized that "we cannot say with 100% certainty whether Sell will regain competency with this treatment."

282 F.3d at 570. Indeed, the government's two medical experts testified that they had a 50 – 75% rate of success in using antipsychotic medication to restore competency to persons, like Dr. Sell, with delusional disorders.[2] *Id.* Thus, if the government is permitted to forcibly administer the antipsychotic medications to Dr. Sell, there is a 25 - 50% possibility that the medications would not satisfy the government's interest in restoring his competency to stand trial. As Judge Bye noted in his dissent in this case, the government is seeking to forcibly medicate Dr. Sell "*on the chance* it will make him competent to stand trial." 282 F.3d at 572 (Bye, dissenting) (emphasis added). A substantial possibility exists, however, that should the government forcibly medicate Dr. Sell, he

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[2] Furthermore, Dr. Wolfson testified that he had not been successful in restoring competency to patients with the drug Olanzapine. Nevertheless, this is one of the two drugs that he suggested as treatment for Dr. Sell.

Dr. Sell has been diagnosed with the persecutory subtype of delusional disorder. The Eighth Circuit described his diagnosis as follows:

> Delusional disorder is characterized by the presence of one or more nonbizarre delusions that persist for at least one month. The delusions are generally plausible ideas that can conceivably occur in real life. The persecutory subtype of delusional disorder is characterized by a person's belief that he is being conspired against, cheated, spied on, followed, *poisoned or drugged*, maliciously maligned, harassed, or obstructed in the pursuit of long term goals.

282 F.3d at 563, n.3 (emphasis supplied; citations omitted.) It is a supreme irony that it is in order to relieve Dr. Sell of such delusions that the government proposes to forcibly inject him with antipsychotic drugs.

would be placed at risk of the dangerous, potentially life-altering and even deadly side-effects of the medications as well as having his mental state chemically altered, all for naught. The government should not be allowed to force Dr. Sell to bear the burden of these risks.

B. The Weight of the Government's Interest in Bringing the Defendant to Trial Should Also Depend on the Seriousness of the Crime Charged.

The government's interest in increasing by 50 – 75% the likelihood that a pretrial detainee might be made sufficiently competent to allow a fair trial to be conducted is not so compelling that it should outweigh the pretrial detainee's fundamental rights to bodily integrity and to control his own thought processes. The Court's *amicus* urges the Court to hold simply that nondangerous pretrial detainees may not be forcibly medicated with antipsychotic drugs for the sole purpose of rendering them competent to stand trial. However, even if the government's interest in trying an individual is sufficient to permit the state to forcibly medicate an individual in very serious cases, the government's interest is insufficient in less serious cases like the one at bar.

Several circuit courts, including the Eighth Circuit in the instant case, have held that the seriousness of the crime charged is important to determining whether the government may forcibly medicate an individual with antipsychotic drugs in order to attempt to render the detainee competent to stand trial. *See Sell*, 282 F.3d at 568 (holding that "in view of the seriousness of the [fraud] charges" against Sell, the government's interest is paramount); *United States v. Weston*, 255 F.3d 873, 881 (D.C. Cir. 2001)

("the government's interest in finding, convicting, and punishing criminals reaches its zenith when the crime is the murder of federal police officers in a place crowded with bystanders where a branch of government conducts its business"); *Brandon*, 158 F.3d at 961 (6th Cir.) ("We find it difficult to imagine … that the government's interest in prosecuting the charge of sending a threatening letter through the mail could be considered a compelling justification to forcibly medicate Brandon.").

The government seeks to forcibly medicate Sell in order to try him for making "false representations in connection with the payment of health care services," 18 U.S.C. § 1035 (a)(2) and money laundering, 18 U.S.C. § 1957(a). These are not violent crimes. 282 F.3d at 573 (Bye, dissenting). Furthermore, should Dr. Sell be convicted of these crimes, the United States Sentencing Guidelines, would suggest that Dr. Sell receive roughly 33 to 41 months in prison. *Id*. That period is longer than the approximately four years Dr. Sell has been detained pending trial. Even assuming that the government may forcibly administer antipsychotic medication to some non-dangerous pretrial detainees for the sole purpose of making them competent to stand trial, the government's interest in prosecuting Dr. Sell for these nonviolent white collar crimes is insufficient to justify the offenses to his liberty and threats to his safety posed by these drugs.

CONCLUSION

Two of our most cherished and fundamental rights are at stake in this case: the right to maintain the integrity of one's own body and the right to control one's own mind. While, like other constitutional rights, these rights are not absolute, they should nevertheless be afforded the strongest protection that this Court can offer and

should only be infringed in the narrowest circumstances. Conversely, the dangerous and intrusive nature of forcible treatment with antipsychotic medication militates against such treatment except in rare circumstances. The government's interest in attempting to bring Dr. Sell to trial for his nonviolent victimless crimes, albeit strong, is not the type of compelling justification that should suffice to override these basic rights.

The Court's *amicus* respectfully submits that for the reasons set forth herein, the judgment of the Court of Appeals should be reversed.

John W. Whitehead
Steven H. Aden
(Counsel of Record)
M. Casey Mattox
The Rutherford Institute
112 Whitewood Rd.
Charlottesville, VA 22901
(434) 978-3888

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